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SUPREME COURT, U.S.

80-5818

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980

No.

JOHN B. MUMFORD, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No.

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PETITION FOR A WRIT OF CERTIORARI TO THE
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Petitioner, John B. Mumford, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled action on October 2, 1980.

OPINIONS BELOW

A copy of the Judgment and Probation/Commitment Order entered on February 16, 1979 by the United States District Court for the Eastern District of Virginia (Alexandria Division) appears in the Appendix to this petition (Appendix, 1a).

The opinion of the United States Court of Appeals for the Fourth Circuit also appears in the Appendix to this petition (Appendix, 2a-12a). This opinion is reported in Fed. Sec. L. Rep. (CCH) ¶97,648 (Oct. 2, 1980).

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on October 2, 1980. Petitioner has caused this petition to be filed in this Court on December 1, 1980, within 90 days after entry of such judgment.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the principles of res judicata and collateral estoppel require dismissal of an indictment against petitioner in a criminal case in which the issues of law and fact raised by the indictment had already been determined in petitioner's favor and against the United States by a final judgment of a federal court of competent jurisdiction in a prior civil action.

STATUTORY PROVISIONS INVOLVED

Petitioner was convicted on jury verdicts for violation of 18 U.S.C. §1341, 15 U.S.C. §77q(a), 15 U.S.C. §77x, 18 U.S.C. §2314, 18 U.S.C. §1001 and 18 U.S.C. §2. These statutory provisions are not directly involved in the question presented in this petition; however, these provisions are set forth fully in the Appendix to this petition (Appendix, 13a-14a).

STATEMENT OF THE CASE

1. Preliminary Statement

The United States ("Government") has put petitioner John B. Mumford ("Mumford") on trial twice for alleged violations of the federal securities laws and -- in both trials -- raised the same factual and legal issues. The Government failed to prove its claims against Mumford in the first trial, a civil action brought by the Securities and Exchange Commission ("SEC"). Indeed, at the conclusion of the civil action, the District Court specifically found that the SEC failed to prove that Mumford had violated any of the federal securities laws.[1]

[1] Securities and Exchange Commission v. Cortes Randell, et al., Civil Action No. 77-872-A (E.D. Va., Feb. 24, 1978).

Final judgment on the merits was entered in favor of Mumford. The United States Court of Appeals for the Fourth Circuit affirmed.[2]

The Government thereafter put Mumford to trial a second time on the same claims under the federal securities laws pursuant to an indictment. The Government was successful on this second attempt. At the conclusion of this second trial, jury verdicts of guilty were returned against Mumford and a co-defendant Cortes W. Randell ("Randell") on all counts of the indictment. The United States Court of Appeals for the Fourth Circuit affirmed the District Court's judgment of conviction on the jury verdicts.

2. The Prior Civil Proceeding

On January 16, 1976, the SEC issued a formal order of investigation and commenced its investigation of National Commercial Credit Corporation ("National") and its shareholders, directors and officers, including Mumford, a former officer and director of National. The SEC filed a complaint in the United States District Court for the Eastern Division of Virginia on November 30, 1977. That complaint alleged claims under the federal securities laws against Randell and others, including Mumford. On December 7, 1977, all of the defendants except Mumford consented to the injunction sought by the SEC in that action. Mumford denied the SEC's allegations against him and declined to sign any consent decree.

The SEC elected to try its claims against Mumford. At the conclusion of the SEC's civil action, the Honorable Oren R. Lewis filed a Memorandum Opinion and signed an order dismissing the SEC's complaint against Mumford. Judge Lewis found that the evidence fell "short of that necessary to find that he [Mumford]

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[2] Securities and Exchange Commission v. John B. Mumford, No. 78-1386 (4th Cir., Feb. 22, 1980) (unpublished).

had willfully violated any of the SEC laws . . ." and concluded that the SEC "failed to prove that the defendant Mumford has either violated or is likely to violate" the federal securities laws. The District Court accordingly entered a final judgment on the merits in favor of Mumford. The United States Court of Appeals for the Fourth Circuit affirmed in an unpublished opinion.[3]

Because of its importance to the question presented in this petition, the text of the Memorandum Opinion and Order of Judge Lewis issued on February 17, 1978 is here set out in full:

> This Court is of the opinion that the Securities and Exchange Commission (SEC) is not entitled to a permanent injunction against the defendant John B. Mumford, and
>
> It Is So Ordered.
>
> The evidence in this case discloses that Cortes Randell was a director and the principal stockholder of National Commercial Credit Corporation and that he and his wife, Joan Randell, controlled Federal Mortgage Acceptance Corporation. Mr. Mumford was a Vice-President of NCCC and later President of both NCCC and FMAC.
>
> The evidence further disclosed that Mr. Randall, Mrs. Randell and FMAC consented to the issuance of the same type of permanent injunction as requested by the SEC in this case, without a finding or admission of liability.
>
> Although the evidence discloses that Mr. Mumford did have, or should have had, knowledge as Vice-President and President of the corporations of what was being done with corporate funds, and what had been done in re the issuance of corporate obligations in exchange for secured obligations, it falls far short of that necessary to find that he had willfully violated any of the SEC laws.
>
> The evidence further disclosed that Mr. Mumford has not engaged in the sale of any securities or worked for any organization regulated by the SEC for the past three and one-half years. He is now and has been employed by the Executive Branch of the United States Government as an official of the Labor Department - and he has assured the Court that he has no intention of engaging in

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[3] See note 2, supra.

any activity involving the sale of any regulated securities or investments in the foreseeable future.

This Court has also been advised that this matter has been turned over to the United States Attorney for this District for further investigation and has been informed that several local attorneys are considering filing suits against the defendants to recoup the losses sustained by their clients flowing from their purchase of securities from the said defendants.

Having failed to prove that the defendant Mumford has either violated or is likely to violate the SEC laws, this suit must be dismissed, and

It Is So Ordered. [Emphasis added.]

3. The Subsequent Criminal Proceeding

On October 1, 1978, a federal grand jury returned a seventeen-court indictment against Randell and Mumford on charges of securities violations in connection with National. Mumford moved to dismiss the indictment on the ground, inter alia, that the principles of res judicata and collateral estoppel barred the Government, which had lost the prior civil action, from instituting an identical criminal action against him. Judge Lewis denied this and all other pending motions of all parties, without opinion, three days before trial on the indictment commenced before the Honorable Albert V. Bryan, Jr. in the United States District Court for the Eastern District of Virginia.

Upon conclusion of the trial before Judge Bryan, the jury returned verdicts against Randell and Mumford on all seventeen counts of the indictment. Judgments were entered on the verdicts and, after post-trial motions and sentencing, an appeal was taken to the United States Court of Appeals for the Fourth Circuit, which affirmed the convictions.

4. Identity of The Two Actions

The civil action, determined adversely to the Government, was based upon the same operative facts and legal issues as

was the subsequent criminal indictment. The identity of the civil and criminal actions is obvious from a comparison of the Complaint in the civil action and the indictment in the criminal action. Paragraph 21 in Count Two of the Complaint stated as follows:

> During the period from on or about February 8, 1974 at least April 1975, the defendants, in the Eastern District of Virginia and elsewhere, at various times, singly, and in concert, directly and indirectly in connection with the offer and sale of securities, namely, secured and unsecured corporate notes of NCCC, by the use of the means or instruments of transportation and communication in interstate commerce and of the mails, have been employing devices schemes and artifices to defraud, engaging in acts, practices and courses of business which operate as a fraud and deceit upon purchasers and prospective purchasers of such securities and have been obtaining money and property by means of untrue statements of material facts and omissions to state material facts, necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, as hereinafter more fully described. (Emphasis added.)

These allegations are substantively identical to the seventeen count indictment, wherein the Government's allegations are summarized in Count One, Paragraph B(1):

> From on or about February 1, 1974, and continuing up to the date of this Indictment, in the Eastern District of Virginia and elsewhere, the defendants CORTES W. RANDALL and JOHN B. MUMFORD devised and intended to devise a scheme and artifice to defraud, and to obtain money and property by, among other things inducing financial institutions to lend monies to NCCC, FMAC and the defendant JOHN B. MUMFORD inducing the Veterans Administration to guarantee a loan diverting the assets of NCCC for their own personal gain and use to the detriment of investors and financial institutions, all by means of false and fraudulent pretenses, representations, and promises and by omissions of material facts, hereinafter more particularly set forth, from numerous persons, financial institutions and the Veterans Administration, an agency of the United States of America. (Emphasis added.)

There can be no question that the Complaint and the indictment both were based on Mumford's activities as an officer of National from February 8, 1975, to July 1975, and National's

activities during that period. There is also no question that the same controlling issue was raised in both the Complaint and the indictment, to wit, whether petitioner, in his relationship with National, "devised and intended to devise a scheme and artifice to defraud" investors and financial institutions. In sum, in the two actions, the parties, issues and operative facts were identical.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals' ruling that res judicata does not apply where the first action is civil and the second action is criminal is in conflict with the decisions of this Court and of another circuit.

Mumford argued at trial and in his appeal to the United States Court of Appeals for the Fourth Circuit that res judicata and collateral estoppel barred the Government from attempting to relitigate in the subsequent criminal trial the same facts and issues that were presented and determined adversely to the Government in the prior civil action. The Court of Appeals, while noting that Mumford's argument "presents a difficult issue" (Appendix, 7a), held that res judicata was inapplicable because a complaint in a civil action and an indictment cannot "present the same cause of action . . ." (Appendix, 8a).

The Fourth Circuit's conclusion is in conflict with the decision of the Eighth Circuit in Dranow v. United States, 307 F.2d 545, 556 (8th Cir. 1962):

> There can be no doubt about the proposition that res judicata and collateral estoppel are applicable in a criminal action although a prior proceeding was civil in character.

The Fourth Circuit's conclusion is also inconsistent with this Court's holding in Yates v. United States, 354 U.S. 298, 335 (1956):

> We are in agreement with petitioner that the doctrine of collateral estoppel is not made inapplicable by the fact that this is a criminal case, whereas the prior proceedings were civil in character.

Most importantly, the Fourth Circuit's conclusion is inconsistent with this Court's reasoning and holding in Standefer v. United States, ____ U.S. ____, 48 U.S.L.W. 4634 (June 9, 1980). In Standefer, this Court held that a prior criminal action could not preclude a subsequent action because, in criminal actions, the government is "often without the kind of 'full and fair opportunity to litigate' that is a prerequisite of estoppel." 48 U.S.L.W. at 4637. Standefer indicates most strongly that where -- as in this case -- the first action is an action in which the government has a full and fair opportunity to litigate, a judgment in that action precludes relitigation. Cf. Montana v. United States, 440 U.S. 147 (1979).

2. The Court of Appeals' reliance on portions of the civil trial transcript to negate the clear language of the District Court's Memorandum Opinion and Order and thereby to hold collateral estoppel inapplicable is in conflict with its own precedents and the decisions of other circuits.

The District Court's Memorandum Opinion and Order in the prior civil action unambiguously found that the Government's evidence "falls short of that necessary to find that he [Mumford] had willfully violated any of the SEC laws" and that the Government "failed to prove that the defendant Mumford has either violated or is likely to violate" the federal securities laws. Notwithstanding this clear language in the District Court's judgment, the Fourth Circuit held that collateral estoppel did not apply because "[t]he only issue actually litigated in the SEC action was the likelihood that Mumford would engage in future SEC violations." (Appendix, 8a). To reach that conclusion -- which necessarily ignored the final order of the District Court -- the Fourth Circuit looked to selected portions of the transcript of the civil trial. With deference, that is not even-handed justice; it is a coup de main.

The Fourth Circuit's reliance on excerpts from the trial transcript to negate the legal effect of the District Court's order is in direct conflict with that same Court's admonition in Segars v. Atlantic Coast Line Railroad Company, 286 F.2d 767, 770 (4th Cir. 1961):

> It is the formal order that determines the action of the Court rather than some chance statement or observation made by the Judge during the course of oral arguments.

At least one other circuit has expressly recognized that a federal Court speaks through its orders rather than through remarks made during the proceedings. In Herman v. Hess Oil Virgin Islands Corp., 524 F.2d 767, 772 n.11 (3d Cir. 1975), the Third Circuit wrote:

> In any event, the district court's written opinion . . . takes precedence over any prior oral statements by the district judge that are arguably to the contrary.

3. The Court of Appeals' decision presents important issues which should be settled by this Court.

The Fourth Circuit acknowledged that Mumford's arguments based on res judicata and collateral estoppel present difficult questions. The Fourth Circuit wrote:

> Seldom does the government, having had an issue determined adversely to it in a civil action with the less demanding burden of proof, institute criminal proceedings on the same facts and issues against the same party. [Appendix, 7a.]

The Fourth Circuit's approval of the Government's unprecedented conduct would establish a special privilege for the Government at the expense of its citizens. It stands decided that the Government as litigant, having failed on the merits of a civil action, is -- like any other litigant -- barred from relitigating the issues on which it failed in another civil action, Montana v. United States, supra. It cannot be that the result is different if the Government elects to cast its second attempt in criminal, not civil, terms.

To permit such a result is unfair to the citizen who, having successfully defended against the Government's civil claims, must nonetheless defend again when the same charges are thereafter framed in a criminal proceeding. It is also wholly inconsistent with the policies against duplicative litigation which underlie the doctrines of res judicata and collateral estoppel. At a minimum, if the Government is to be given such a dispensation -- no hint of which appears in this Court's recent decisions in Parklane Hosiery Company v. Shore, 439 U.S. 322 (1979), and Standefer v. United States, ___ U.S. ___, 48 U.S.L.W. 4634 (June 9, 1980) -- it is this Court which must grant it.

Subsequently to the decision in Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 329 (1971), this Court has decided that where the government, as litigant, succeeds on the merits in a civil action, the findings in that action may be used offensively by subsequent plaintiffs, Parklane Hosiery Company v. Shore, supra, and that, where the government (or its privy) fails on the merits in a civil action, that failure subsequently estops the government from subsequent civil litigation. Montana v. United States, supra. This Court has also decided that, where the government fails on the merits in a criminal action, the judgment in that action adverse to the government is not preclusive. Standefer v. United States, supra. This petition presents a question which has not been (but should be) addressed by this Court in the post-Blonder-Tongue period: Where the government fails on the merits in a civil action, should the judgment in that action bar a subsequent, identical criminal action. Compare Yates v. United States, 354 U.S. 298 (1956). To answer that question affirmatively, certiorari should be granted.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Petition for a Writ of Certiorari has been served upon the United States Government, c/o ~~Caroline Hook, Esq.~~ Solicitor General for, Criminal Appellate Section, U. S. Department of Justice, P.O. Box 899, Washington, D. C. 20044, by placing the same in the U.S. mail, postage prepaid, this 1st day of December, 1980.

Gregory L. Murphy

APPENDIX

United States of America vs.

United States District Court for

EASTERN DISTRICT OF VIRGINIA
Alexandria Division

DEFENDANT: JOHN B. MUMFORD

DOCKET NO.: Cr. 78-199-A

JUDGMENT AND PROBATION/COMMITMENT ORDER — AO-245 (5/75)

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date → MONTH 02 DAY 16 YEAR 79

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[XX] WITH COUNSEL Gregory L. Murphy, Esq. & Joseph D. Lonardo, Esq.
(Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [X] NOT GUILTY

FINDING & JUDGMENT

There being ~~a finding~~/verdict of [ ] NOT GUILTY. Defendant is discharged
[X] GUILTY.

Defendant has been convicted as charged of the offense(s) of Cts. 1-7 18 U.S.C. 1341 and 2, Mail Fraud; Counts 8-12 15 USC 77(q)(a) and 77(x) and 18 U.S.C. 2, Securities Fraud; Counts 13-16 18 U.S.C. 2314 and 2 Interstate Transportation of Securities and Money by Fraud; Count 17 18 U.S.C. 1001 and 2, Concealment of Material Facts

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: ~~[illegible]~~ imposition of sentence is suspended on counts 1-16 and the defendant is placed on probation with supervision for a period of five (5) years. On count 17 the defendant is committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three (3) years and on condition that the defendant be confined in a jail type institution for a period of six (6) months the balance of the sentence is suspended and the defendant be placed on probation with supervision for a period of five (5) years, to run concurrently with the probation imposed on Counts 1-16.

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY
[XX] U.S. District Judge
[ ] U.S. Magistrate

/s/ [illegible]

Date 02-16-79

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-5087

United States of America,

Appellee,

v.

John B. Mumford,

Appellant.

No. 79-5088

United States of America,

Appellee,

v.

Cortes W. Randell,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

Argued: August 13, 1980 Decided: October 2, 1980

Before FIELD, Senior Circuit Judge; HALL and SPROUSE, Circuit Judge

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A. Raymond Randolph, Jr. (V. Thomas Lankford, Jr., Richard A. Kaplan, Sharp, Randolph & Green on brief) for Appellant in 79-5088; David S. Cupps (Joseph D. Lonardo, Vorys, Sater, Seymour and Pease; Gregord L. Murphy, Murphy, McGettigan, McNally & West on brief) for Appellant in 79-5087; Carolina Heck, Department of Justice (Morris B. Silverstein, Department of Justice, William C. Bryson, Department of Justice; Justin W. Williams, United States Attorney, Theodore S. Greenberg, Assistant United States Attorney on brief) for Appellee.

HALL, Circuit Judge:

John Mumford and Cortes Randell were convicted by a jury on seven counts of mail fraud in violation of 18 U.S.C. §1341; five counts of securities fraud in violation of 15 U.S.C. §§77(q)(a) and 77(x); four counts of interstate transportation of securities and money obtained by fraud in violation of 18 U.S.C. §2314; and on one count of submitting a false statement to a United States agency in violation of 18 U.S.C. §1001. Mumford was sentenced to three years' imprisonment on the false statement conviction, with all but six months of the term suspended, and to five years' concurrent probation on all 17 counts. Randell was sentenced to concurrent five-year terms for his conviction on four counts of mail fraud and to concurrent two-year terms for his conviction on three other mail fraud counts to run consecutively with the first sentence. From their convictions Mumford and Randell noted their respective appeals. Upon consideration of the briefs and after oral argument, we affirm their convictions.

I.

On October 5, 1978, Mumford and Randell were indicted by a federal grand jury for their alleged participation in a scheme to defraud investors and financial institutions.

The alleged scheme was founded on the appellants' involvement in two Virginia corporations, the National Commercial Credit Corporation (NCCC) and the Federal Mortgage Acceptance Corporation (FMAC). NCCC was originally formed as Potomac Valley Homes in 1966 for the purpose of dealing in the second mortgage business. It had become NCCC in the early part of 1973 when Randell was hired to strengthen it and to prepare it for public offering as he had done in the 1960's with the National Student

Marketing Corporation.[1] Randell's wife, Joan, loaned NCCC $140,000 in 1973. This loan was collateralized by $205,000 worth of NCCC second mortgages. Through his wife's investments, Randell increased his control over NCCC's operations. The government charged that the appellants concealed the extent of Randell's control over and interest in NCCC from financial institutions and investors.

In early 1974 Randell hired Mumford as a vice-president and director of NCCC. As such Mumford was responsible for the administration of operations which included approving expenditures, signing checks, determining the movement and pledging of NCCC's second mortgage notes, regulating corporate policies and procedures, and dealing with financial institutions, investors and lawyers.

In July of 1974, FMAC was formed ostensibly for the purpose of purchasing second mortgage notes. The majority stockholder was Joan Randell. Mumford became president of both NCCC and FMAC in late July of 1974. The appellants were charged with using FMAC to obtain money from financial institutions by pledging as collateral second trust notes which were not sound. The government also alleged that FMAC, through the appellants' control was used to usurp business opportunities to the detriment of NCCC investors and that FMAC sold second trust notes to NCCC which were not worth the selling price. FMAC was capitalized by the notes which had served as collateral for the NCCC loan from Joan Randell. These notes were listed as assets on the books of both FMAC and NCCC. Joan Randell called her $140,000 loan due on July 5, 1974, but NCCC continued to pay her $1600 a month in interest throughout 1974. As a further part of the scheme to defraud, Mumford and Randell allegedly concealed from investors

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[1]Randell had been convicted of and served a prison sentence for securities fraud arising from his involvement with the National Student Marketing Corporation.

and financial institutions the fact that Joan Randell had called her loan due. They were also accused of failing to minimize the financial loss which resulted when the collateral, the second trust notes which were then worth $280,000, were transferred to Joan Randell.

Financing for the NCCC and FMAC operations was obtained in primarily one or two ways. First, both corporations obtained loans by pledging as collateral second mortgage notes that were represented to be sound and current. The indictment charged that Randell and Mumford caused to be circulated false and misleading financial statements in order to obtain these loans and loan guarantees; that the appellants pledged delinquent and defaulted second trust notes to secure financing from various financial institutions; and that the appellants knowingly made false, fraudulent and incomplete representations to various financial institutions and to the Veterans Administration. The appellant Randell was also charged with scheming to divert and diverting loans obtained by FMAC to his personal account to be used for purposes unconnected with FMAC.

Second, NCCC also raised money from private investors. In 1971 NCCC made a bond offering of $300,000 for 10% bonds to be secured by collateral mortgages equal to 125% of the amount borrowed. The government alleged that Mumford and Randell did not segregate and maintain sufficient collateral to secure this bond offering, and that when an inspection of such collateral was requested, the appellants complied by assembling for inspection certain collateral which was already pledged.

In 1974 Mumford and Randell proposed a conversion offer which would exchange 12% unsecured corporate notes for the 10% secured bonds. Upon the advice of a NCCC attorney, a letter proposing the exchange was sent to the bond holders. In connection with the letter detailing the conversion offer, Mumford and Randell were charged with omitting certain material

facts which made the statement misleading. Mumford and Randell met with some of the investors who were considering the exchange offer to assure them about the soundness of their investment. At this meeting at lease one investor was told that NCCC was doing very well (when in fact it was not) and was given a financial statement of NCCC which had attached to it an unauthorized addendum.

In the fall of 1974, Mumford applied to Metropolitan Mortgage Fund (MMF) for home financing, and to the Veterans Administration for a loan guarantee. On these applications Mumford indicated that he would not be using funds borrowed from other sources to purchase the home. The indictment charged that Mumford intended to use $20,000 that he had borrowed from Joan Randell which was secured by a $27,000 deed of trust note to FMAC.

On December 11, 1977, the Securities and Exchange Commission (SEC) filed a complaint for a permanent injunction and ancilliary relief naming Cortes Randell, John Mumford and others as defendants. The complaint alleged that the defendants had violated, were violating and were likely to continue to violate various securities laws. All of the defendants except Mumford consented to the entry of a permanent injunction and other equitable relief without admitting or denying the SEC charges. On February 24, 1978, the district court dismissed the SEC's request for injunctive relief against Mumford on the ground that the SEC had failed to prove that he had either violated or was likely to violate securities laws. The SEC appealed the dismissal of its complaint to this court. We affirmed the judgment of the district court. SEC v. Mumford, No. 78-1386 (4th Cir. Feb. 22, 1980).

II.

John Mumford raises four issues on appeal.[2] Initially, Mumford contends that his earlier trial on the charges brought by the SEC barred his criminal trial on the ground of res judicata or collateral estoppel.

The appellant's res judicata argument raised in the context of this case presents a difficult issue which is not often confronted by the courts. Seldom does the government, having had an issue determined adversely to it in a civil action with the less demanding burden of proof, institute criminal proceedings on the same facts and issues against the same party. However, only one circuit has held it unfair to allow the government to try again in a criminal trial issues which were determined adversely to it in a prior civil action. Dranow v. United States, 303 F.2d 545 (8th Cir. 1962).[3]

The principal of res judicata dictates that there be an end to litigation. "[I]t rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations," Commissioner v. Sunnen, 333 U.S. 586, 587 (1948); however res judicata serves as a bar to a subsequent litigation only when the prior judgment was returned by a court of competent jurisdiction, when the prior judgment was a final judgment on the merits, when the same parties and their privies are involved in both suits, when the two actions are based on the same issues and material facts and when the two proceedings present the same cause of action. Id. The SEC complaint was for prospective injunctive relief, an equitable action which is in many respects sui generis. This trial is a

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[2]Randell joins in Mumford's appeal, except on the issue of severance.

[3]In Dranow, the court held that where the object of both proceedings was punishment, there was no doubt that res judicata barred the second trial.

criminal action.[4] Since the two proceedings do not present the same cause of action res judicata does not bar the criminal prosecution of Mumford.[5]

Unlike res judicata, the doctrine of collateral estoppel may be applicable when the first cause of action was civil and the second is criminal. Yates v. United States, 354 U.S. 298 (1956); Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979). Collateral estoppel precludes the relitigation of issues actually litigated which were necessary to the outcome of the first action. 1B J. Moore, Federal Practice ¶0.405[1] (2d ed. 1974). Mumford argues that collateral estoppel bars relitigation of the question of his past criminal conduct since the order dismissing the SEC civil action stated that the evidence "falls short of that necessary to find that he [Mumford] had willfully violated any of the SEC laws." While the written order appears to resolve the issue of Mumford's willful violation of SEC laws adversely to the government, a review of portions of the transcript reveals that on numerous occasions the trial judge made it clear that the court did not intend to reach the merits of the charges relating to Mumford's past conduct. The civil trial focused solely on whether the requested injunctive relief should be granted. The only issue actually litigated in the SEC action was the likelihood that Mumford would engage in future SEC violations. Since the two proceedings addressed different

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[4]We recognize that a difference in remedies sought does not alone differentiate the underlying claims. Williams v. Ward, 556 F.2d 1143 (2d Cir. 1977); Lambert v. Conrad, 536 F.2d 1183 (7th Cir. 1976). However, the difference between the present underlying claims with their differing elements and burdens of proof is so great that there exist two separate causes of action.

[5]Randell's reliance on the prior SEC action for preclusive effect is misplaced since he was not a party to the SEC proceeding. Nor can Randell argue that the consent decree has any preclusive effect since there was not an adjudication of the issues.

issues, collateral estoppel does not apply. The district court properly denied the appellant's motion to dismiss the indictment.

Mumford argues that the district court erred in failing to dismiss the indictment because of alleged prosecutorial misconduct before the grand jury. The alleged misconduct stems from the appearance before the grand jury of a SEC attorney who had participated in the investigations which led to the SEC civil action. We find this argument to be without merit.

Mumford also contends that his motion for mistrial should have been granted because of the government's assertedly improper and prejudicial questions to a witness about his prior conviction for fraud. The record supports the government's contention that this questioning was a proper trial strategy designed to take the "sting" out of cross-examination. Furthermore, the jury was given a cautionary instruction which was sufficient to ensure the proper use of evidence. United States v. Bobo, 477 F.2d 974 (4th Cir. 1973).

Mumford's last ground for appeal relates to the district court's denial of his motion for severance. Since the original joinder was proper under Rule 8(b) of the Federal Rules of Criminal Procedure, we uphold the denial of the motion to sever since there is no showing that the trial judge abused his discretion.

III.

In addition to joining in Mumford's appeal, Cortes Randell raises six issues of his own on appeal. First, he contends that the prosecution's conduct at trial in eliciting testimony from various witnesses was improper. A review of the record discloses that the instances of prosecutorial misconduct cited by Randell were isolated occurrences which drew swift rebukes from the trial judge in a lengthy and complicated trial. Furthermore, "every slight excess does not require that a

jury's verdict be overturned and a new trial awarded." United States v. Borda, 285 F.2d 405, 408 (4th Cir. 1961).

Second, Randell assigns as error certain evidentiary rulings made during the trial regarding the admissibility of Randell's prior conviction for securities fraud as well as the propriety of propounding what Randell characterized as hypothetical questions to lay witnesses. We find that the trial judge did not abuse his discretion on either of these evidentiary rulings. United States v. Mastrotaro, 455 F.2d 802 (4th Cir. 1972).

Third, Randell contends that he was indicted and convicted for his failure to testify before the SEC and the federal jury.[6] Randell did not testify before either the grand jury or the SEC. He argues that the portion of the indictment which charged him with concealing the scheme to defraud constitutes a penalty on the exercise of his fifth amendment privilege against self-incrimination.

It is axiomatic that no person may be penalized for the exercise of a constitutional privilege. Grunewald v. United States, 353 U.S. 391 (1957). The privilege against self-incrimination extends to grand jury and other governmental proceedings. Hale v. Henkel, 201 U.S. 43 (1906). The indictment as originally returned did contain the words "federal grand jury;" however, these words were stricken prior to trial on the government's motion. It is argued that the deletion of these words constituted an amendment of the indictment which can not be

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[6]Randell's argument centers on Count I, ¶B2 x of the indictment as originally returned which charged:

It was further a part of the scheme and artifice to defraud that the defendants CORTES W. RANDELL and JOHN B. MUMFORD would and did conceal and cause to be concealed from investors, financial institutions, the State Corporation Commission of Virginia, the Veterans Administration, the United States Securities and Exchange Commission, and a federal grand jury, the scheme and artifice to defraud described above in Paragraphs 2(a) through (w) of this Count.

done except by resubmission to the grand jury. Russell v. United States, 369 U.S. 749 (1962). We find this argument to be unpersuasive. The deletion of the words "federal grand jury" only narrowed the charges against Randell; indeed, the deletion was favorable to Randell since no evidence was presented at trial on this charge. United States v. Holt, 529 F.2d 981 (4th Cir. 1975).

We must therefore decide whether that portion of the indictment which charged Randell with concealment from the SEC of the scheme to defraud amounted to a comment on his failure to come before the SEC. There is nothing in the record to support Randell's contention that he was penalized for failing to testify before the SEC. There is no indication that Randell was ever asked to appear before any representative of the SEC. However, the grand jury did hear testimony that established that Cortes Randell had spoken to Barbara Fisher, a former NCCC employee, about her pending meeting with a Securities and Exchange Commission attorney. There was other evidence which showed an attempt by Randell to persuade Ms. Fisher to be less than candid about NCCC's operations when she met with the SEC attorney. It is reasonable to assume that Randell's efforts at persuasion could be considered concealment or attempted concealment. It is also reasonable to assume that Randell was indicted for concealment from the SEC of the scheme to defraud because of his failure to include certain material facts in the conversion offer letter he and Mumford prepared and sent to investors. Randell's argument that the grand jury indicted him for concealment because he failed to testify before the SEC is, in our opinion, unsupported by the record and does not warrant the dismissal of

the indictment. United States v. West, 549 F.2d 545 (8th Cir.), cert. denied, 430 U.S. 956 (1977).[7]

The remaining points upon which Randell seeks reversal, that the trial judge erred in submitting a lengthy "speaking" indictment to the jury and that Randell's conviction as an aider or abettor cannot be sustained if Mumford's conviction is reversed, have been considered and found to be untenable.

Accordingly, we affirm the convictions of Mumford and Randell. The judgments of the district court are hereby

AFFIRMED.

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[7]Even if the grand jury had charged Randell with concealment because of his failure to testify before them or before the SEC, his conviction would not need to be reversed. Since Randell was sentenced to concurrent jail terms on the first five counts of mail fraud, under the concurrent sentence doctrine it would not be necessary to review the validity of his conviction on Count 1. United States v. Truong Dinh Hung, No. 78-5176/77 (4th Cir. July 17, 1980). There is no substantial possibility that Randell's conviction on Count 1 of the indictment will adversely affect his right to parole nor will it subject him to adverse collateral consequences. Benton v. Maryland, 395 U.S. 784 (1969); Close v. United States, 450 F.2d 152 (4th Cir. 1971), cert. denied, 405 U.S. 1068 (1972).

STATUTORY PROVISIONS INVOLVED

15 U.S.C. §77q(a)

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly --

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

15 U.S.C. §77x

Any person who willfully violates any of the provisions of this subchapter, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this subchapter, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. §2

(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. §1001

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. §1341

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give

away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. §2314

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Wheover, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof--

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country.

80-5818

RECEIVED
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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980

No.

JOHN B. MUMFORD, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, John B. Mumford, asks leave to file the attached Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit without prepayment of costs and to proceed in forma pauperis, pursuant to 28 U.S.C. §1915 and Rule 53 of this Court.

The petitioner's affidavit in support of this motion is attached hereto; he has not previously sought to proceed in forma pauperis.

Respectfully submitted,

Gregory L. Murphy
MURPHY, MCGETTIGAN, MCNALLY & WEST
921 King Street
Alexandria, Virginia 22314

David S. Cupps
Joseph D. Lonardo
VORYS, SATER, SEYMOUR AND PEASE
52 East Gay Street
P. O. Box 1008
Columbus, Ohio 43216

Counsel for Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Motion For Leave to Proceed In Forma Pauperis has been served upon the United States Government, c/o Caroline Heck, Esq., Criminal Appellate Section, U.S. Department of Justice, P.O. Box 899, Washington, D.C. 20044, by placing the same in the U.S. mail, postage prepaid, this 1st day of December, 1980.

Gregory L. Murphy

80-5818

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AFFIDAVIT OF PETITIONER, JOHN B. MUMFORD, IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, John B. Mumford, being first duly sworn, depose and say, in support of my application for leave to proceed without being required to prepay costs or fees:

1. I am the petitioner in the above-entitled cause.

2. I desire to petition this Court for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit, but because of my poverty I am unable to pay the costs of such petition or give security therefor and still be able to provide myself and my dependents with the necessities of life.

3. I believe that I am entitled to the redress I seek by such petition.

4. The nature of the above-entitled cause is briefly stated as follows: I was convicted upon jury verdicts returned after trial on an indictment charging me with violating or aiding and abetting in the violation of 18 U.S.C. §1341, 15 U.S.C. §77q(a), 18 U.S.C. §2314 and 18 U.S.C. §1001. I appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed the judgment of conviction.

5. I have not sought leave to proceed in forma pauperis in any court below.

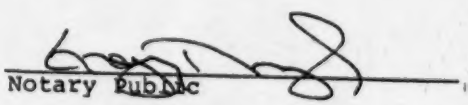
6. The nature of the issue to be presented upon my petition to this Court is briefly stated as follows: Whether the District Court and the Court of Appeals erred in refusing to enforce the principles of res judicata and collateral estoppel by dismissing the indictment against me in a criminal case in which the issues of law and fact raised by the indictment had already been determined in my favor and against the United States by a final judgment of a federal court of competent jurisdiction in a prior civil action.

WHEREFORE, I, John B. Mumford, pray that leave be given to proceed in forma pauperis and that I not be required to pay fees, costs or give security therefor.

John B. Mumford

COMMONWEALTH OF VIRGINIA)
COUNTY OF FAIRFAX) SS:

Sworn to and subscribed in my presence this 1st day of December, 1980.



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